

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS W. WHITE and SARAH L. WHITE,
Plaintiffs-Appellants,

UNPUBLISHED
March 1, 2007

v

MEGAN H. GALLAGHER,

No. 269647
Oakland Circuit Court
LC No. 2005-066743-CK

Defendant-Appellee.

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendant pursuant to MCR 2.116(C)(7), based on res judicata. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs bought residential property from defendant, mistakenly believing that the purchase included two adjacent lots. Because the deed only conveyed one lot, neither plaintiffs nor defendant paid property taxes on the second lot, which later was sold at a tax sale. Plaintiffs brought an action for misrepresentation against defendant, the real estate agent and agency that handled the transaction for defendant, and the tax sale purchaser. Defendant was never served in the prior action and the trial court never assumed personal jurisdiction over defendant in that action. The trial court later granted summary disposition to the remaining defendants.

Plaintiffs subsequently brought this action against defendant to quiet title and for misrepresentation. Plaintiffs' complaint was based on the same allegations asserted in the prior action. Defendant, acting in propria persona, moved for summary disposition, raising substantive arguments concerning the elements of a claim for misrepresentation. Although she described plaintiffs' action as a "second-bite at the apple," she did not formally raise any arguments concerning res judicata. The trial court did not address the parties' substantive arguments, but instead determined that plaintiffs' action against defendant was barred by res judicata and dismissed it on that basis.

A party is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's action is barred by a prior judgment. This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7). *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The issue whether res judicata bars a subsequent action also is reviewed de novo. *Id.* The doctrine of res judicata "bars a second, subsequent action when (1)

the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” *Id.* at 121.

Plaintiffs argue that the second requirement is not satisfied because defendant was never served in the prior action and, therefore, was not a party. Regardless of whether defendant was properly made a party to the prior action, however, res judicata applies to both parties and their privies. The parties to the second action need be only substantially identical to the parties in the first action. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. *Adair*, *supra* at 122; *Peterson Novelties*, *supra* at 12-13. Defendant’s real estate agent and agency in the underlying real estate transaction were both parties to the prior action and, therefore, were in privity with defendant. Thus, all requirements of res judicata are satisfied.

Plaintiffs argue on appeal that res judicata is an affirmative defense that defendant was required to raise in her first responsive pleading. Plaintiffs argue that the trial court erred in sua sponte granting summary disposition based on an affirmative defense that defendant failed to raise. MCR 2.111(F)(3) provides that affirmative defenses must be stated in a party’s responsive pleading. MCR 2.111(F)(3)(a) does not include res judicata in the list of affirmative defenses that must be raised in the defensive pleading, but MCR 2.111(F)(3)(b) provides that the party “must state the facts constituting . . . a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part.” The doctrine of res judicata falls under this provision.

Although defendant did not raise the defense of res judicata in her answer, the trial court had the discretion to allow her to amend her answer to properly plead this defense. MCR 2.111(F); see also MCR 2.118. We conclude that any error in not requiring defendant to first amend her pleadings was harmless. In the context of this action, the application of res judicata is clear. The facts giving rise to this defense are not disputed. Thus, a remand to remedy this procedural defect by allowing defendant to properly raise the defense in an amended pleading would be futile. Under the circumstances, plaintiffs’ substantial rights were not affected and refusal to reverse is not inconsistent with substantial justice. MCR 2.613(A); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 480; 663 NW2d 447 (2003).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder